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MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

APR 29 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE PARSONS CO., INC.,)
)
Plaintiff/Counterdefendant/)
Appellee,)
)
v.)
)
DESERT PLANTS CONSERVANCY, LLC;)
AWD RANCH, LLC; NILES LIPIN; and)
MIMI PIERRON,)
)
Defendants/Counterclaimants/)
Cross-Claimants/Cross-Defendants/)
Appellants,)
)
v.)
)
R.W. WALKER and EVE F. WALKER,)
)
Defendants/Counterclaimants/)
Cross-Claimants/Cross-Defendants/)
Appellees.)
_____)

2 CA-CV 2010-0067
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV200401368

Honorable Robert Carter Olson, Judge

AFFIRMED IN PART; DISMISSED IN PART

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V Á S Q U E Z, Presiding Judge.

¶1 Appellants Desert Plant Conservancy, LLC; AWD Ranch, LLC; and Niles Lipin and Mimi Pierron (collectively, DPC) appeal from the trial court’s grant of partial summary judgment against them and in favor of appellee The Parsons Co., Inc. (Parsons), quieting title in Parsons to an easement over DPC’s property. DPC also challenges the court’s denial of its motion for a new trial, filed pursuant to Rule 59(a)(4), Ariz. R. Civ. P., that sought to vacate the partial summary judgment ruling. On appeal, DPC contends there were material issues of fact sufficient to withstand summary judgment and the court committed errors of law. DPC also argues the court abused its discretion when it denied DPC’s motion for a new trial and bifurcated the trials on the easement-related issues from the water-rights issues.

¶2 DPC also appeals the trial court's orders granting two motions for summary judgment in favor of appellees R.W. Walker and Eve F. Walker (the Walkers). DPC argues the court erred in dismissing its claims against the Walkers for fraud and negligent misrepresentation after finding them time barred and abused its discretion in striking DPC's statement of facts as a sanction under Rule 11, Ariz. R. Civ. P. DPC also challenges the court's summary judgment against it on its claims of breach of warranty and breach of contract and in favor of the Walkers on their counterclaims for negligent misrepresentation and fraud, asserting there existed disputed issues of material fact.

¶3 For the reasons stated below, we dismiss DPC's appeal as to the partial summary judgment in favor of Parsons and the trial court's denial of DPC's motion for a new trial because we lack jurisdiction, and affirm the court's judgment in favor of the Walkers.

Factual and Procedural Background

¶4 On appeal from a summary judgment, "we view the facts and all reasonable inferences from them in the light most favorable to the nonmoving party." *Aranda v. Cardenas*, 215 Ariz. 210, ¶ 2, 159 P.3d 76, 78 (App. 2007). In 1998, Parsons purchased a parcel of land in Pinal County from the Walkers for use in Parsons' cattle operations. Because the parcel lacked water, Parsons also purchased from the Walkers a twenty-acre parcel upon which a stock pond was located. The twenty-acre parcel was surrounded by land retained by the Walkers (Sections 20 and 30). To provide access to the stock pond, the Walkers granted an easement to Parsons pursuant to a Deed of Easement.

¶5 The easement consisted of a road and several trails that ran through Sections 20 and 30. In 2002, the Walkers sold Sections 20 and 30 to DPC as four separate parcels. DPC intended to use the property for commercial farming operations and for breeding and training small animals. Shortly after purchasing Sections 20 and 30, DPC began erecting fences along the property line. Parsons immediately notified DPC that Parsons was entitled to run cattle across DPC's property to access the stock pond on Parsons' twenty-acre parcel.

¶6 In November 2004, Parsons filed a lawsuit against DPC asserting claims of easement by necessity and implication, seeking to quiet title to the easement, and for a permanent injunction prohibiting DPC from interfering with the easement. DPC filed a counterclaim in which it sought to quiet title to its property free from Parsons' claimed easement, a declaratory judgment, and an injunction. DPC also filed a cross-claim against the Walkers, alleging that Parsons' claims, if proven, constituted a breach of warranty by the Walkers under the DPC/Walker purchase agreement. DPC later amended its cross-claim against the Walkers to include counts for breach of contract, fraud, consumer fraud, and negligent misrepresentation, claiming the Walkers, prior to the closing of escrow, had failed to disclose that Parsons would be running cattle to the stock pond across DPC's property.

¶7 In December 2004, DPC moved for summary judgment on all counts alleged in Parsons' complaint and on all of its claims against Parsons. The trial court granted partial summary judgment in favor of DPC on some of Parsons' claims against

DPC, finding there was neither an easement by implication under the Walker/Parsons 1998 Purchase Agreement, nor did Parsons have an easement by necessity.

¶8 In July 2008, Parsons moved for summary judgment against DPC, this time requesting the trial court to determine Parsons' rights pursuant to the Deed of Easement. In September 2008, the court granted summary judgment in Parsons' favor, finding as a matter of law that the easement was described adequately in the Deed of Easement and that the easement permitted running cattle. The court further found that DPC's right to fence its land did not allow it to fence the cattle out of the easement. The court made no determination as to the width of the easement, expressly reserving that determination for a later date.

¶9 Meanwhile, DPC defaulted on its payments to the Walkers under the promissory notes secured by deeds of trust on the four parcels comprising Sections 20 and 30. The Walkers then filed a third-party counterclaim against DPC alleging separate counts of foreclosure under the four Deeds of Trust. The Walkers sought judgment for unpaid and past-due amounts on the notes and a judgment of foreclosure on the deeds of trust. They later amended their third-party complaint to include counts of fraud and negligent misrepresentation, alleging that DPC had made fraudulent representations in its financial statements, inducing the Walkers to convey the property to it.

¶10 The Walkers subsequently moved for summary judgment on all of their counterclaims and on the claims alleged by DPC in its original and amended cross-complaint. In March 2009, the trial court granted summary judgment in favor of the Walkers on DPC's negligent misrepresentation and fraud counts, finding the claims time

barred by the statutes of limitation. Then, in August 2009, finding no issues of material fact, the court granted the Walkers' motion for summary judgment on the remaining claims.

¶11 On December 7, 2009, the trial court signed a partial judgment memorializing its rulings on all four summary judgments, two in favor of Parsons and two in favor of the Walkers. The court found there was "no just reason for delay" and certified the judgment as final pursuant to Rule 54(b), Ariz. R. Civ. P. However, the court reserved ruling on the issue of the easement's width (as to Parsons) and the issues of fraud damages and the deficiency amount (as to the Walkers) for a later determination. After a bench trial on these issues on April 12, 2010, the court entered two final judgments.¹ DPC did not appeal these judgments, but instead filed a Rule 60(c) motion which, apparently, is still pending.

¹DPC asks us to strike the documents contained in the Walkers' Appendix A, including the final judgment on the Walkers' fraud damages, and Parsons' supplement to the record of final judgment on Parsons' easement and damages claims. We grant DPC's motion and do not consider the substance of the final judgments. We may, however, take judicial notice that a final judgment has been entered post-appeal and that post-judgment motions have been filed, without considering the merits of either the judgment or the motions. *See Scottsdale Mem'l Health Sys., Inc. v. Clark*, 157 Ariz. 461, 468, 759 P.2d 607, 614 (1988) (courts may take notice that judgment rendered and record exists). DPC also asks us to strike Parsons' and the Walkers' references made in their answering briefs related to the pending motion pursuant to Rule 60(c), Ariz. R. Civ. P., and to any factual assertions that were not before the trial court at the time it ruled on the motions for summary judgment. DPC's Rule 60(c) motion was filed after DPC filed its notice of appeal, and we therefore do not consider it. We also do not consider any facts referred to in the parties' briefs that were not available to the trial court when it addressed the motions for summary judgment. *See Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 292, 877 P.2d 1345, 1348 (App. 1994) (our review limited to record before trial court at time it considered motion). DPC's motion is granted.

¶12 Meanwhile, in January 2010 DPC moved for a new trial pursuant to Rule 59(a), Ariz. R. Civ. P., arguing Parsons had committed fraud in obtaining certification for the stock pond and seeking to vacate the September 2008 summary judgment ruling. Several months before it filed the motion, DPC had obtained a report from one of its experts regarding the process for the certification of Parsons' stock pond with the Arizona Department of Water Resources. The report stated the stock pond located on the twenty-acre parcel was built recently and therefore did not qualify for the type of certification obtained by the Walkers and Parsons in 1998. DPC argued that because the stock pond certification was illegal, Parsons was prohibited from running cattle to the illegally certified water and, therefore, was not entitled to an easement. The trial court denied DPC's motion for a new trial by minute entry. DPC timely appealed from the entry of the December 7, 2009 partial judgment and from the court's denial of its motion for a new trial.²

Discussion

I. DPC v. Parsons - Jurisdiction

¶13 As a preliminary matter, we address Parsons' contention that we lack appellate jurisdiction to address the partial summary judgment in favor of Parsons on the easement-related issues. "This court may not address an issue or provide relief if it lacks

²Notably, DPC's motion for a new trial, filed January 25, 2010, challenging the December 7, 2009 partial judgment was untimely in any event. *See* Ariz. R. Civ. P. 59(d) ("A motion for new trial shall be filed not later than 15 days after entry of the judgment."). However, because no party objected to DPC's motion on timeliness grounds below and because the trial court addressed DPC's motion on the merits, we address DPC's argument pertaining to its motion for new trial.

jurisdiction to do so” *State v. Bejarano*, 219 Ariz. 518, ¶ 2, 200 P.3d 1015, 1016 (App. 2008). Because “[p]ublic policy is against deciding cases piecemeal,” our jurisdiction over appeals generally is “limited to final judgments which dispose of all claims and all parties.” *Musa v. Adrian*, 130 Ariz. 311, 312, 636 P.2d 89, 90 (1981); *see also* A.R.S. § 12-2101. Rule 54(b), Ariz. R. Civ. P., permits a trial court to enter an appealable final judgment on fewer than all of the claims in a case, *Garza v. Swift Transp. Co.*, 222 Ariz. 281, ¶ 13, 213 P.3d 1008, 1011 (2009), where such judgment “dispose[s] of at least one separate claim of a multi-claim action,” *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304, 812 P.2d 1119, 1122 (App. 1991), and contains certification language pursuant to Rule 54(b) (trial court may direct entry of final judgment “only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment”). Certification under Rule 54(b), however, “does not give this court jurisdiction to decide an appeal if the judgment in fact is not final, i.e., did not dispose of at least one separate claim of a multi-claim action.” *Davis*, 168 Ariz. at 304, 812 P.2d at 1122. We review de novo whether a trial court has appropriately certified a judgment as final and appealable pursuant to Rule 54(b). *Kim v. Mansoori*, 214 Ariz. 457, ¶ 6, 153 P.3d 1086, 1088 (App. 2007).

¶14 DPC contends in its reply brief that the partial summary judgment in Parsons’ favor was a final, appealable judgment because it clearly determined the easement’s size and location, the core issue in the litigation. Although DPC maintains that the map of the easement attached to the partial summary judgment includes a description of the disputed easement, the trial court explained that the attached legal

description was for illustrative purpose only, that is, “to identify the center line of the easement, . . . not the width.” The trial court expressly stated that “[t]he determination as to the width of the Easement is reserved for a later time.” The judgment, contrary to DPC’s argument, left undecided the central issue disputed by the parties. Specifically, DPC’s position throughout the litigation was that Parsons’ cattle should not be roaming freely through DPC’s property to access the stock pond, but rather through a designated and controlled space. Absent a determination of the width of the easement, an essential element of Parsons’ quiet title claim, the partial judgment was not an ultimate disposition of that claim and did not terminate the action. We conclude that the partial judgment, although containing Rule 54(b) language, was not a final, appealable judgment. *See Davis*, 168 Ariz. at 304, 812 P.2d at 1122. We therefore lack jurisdiction over DPC’s appeal from the court’s partial ruling on the easement-related issues.³

¶15 Similarly, we lack jurisdiction of DPC’s appeal from the trial court’s denial of DPC’s motion for a new trial. After the court granted Parsons partial summary judgment, DPC filed a motion for a new trial pursuant to Rule 59(a)(4), Ariz. R. Civ. P. DPC argued, as it does on appeal, that newly discovered evidence—Parsons’ alleged

³We may, however, take special action jurisdiction when there is no remedy by appeal and a trial court’s ruling constitutes “an abuse of discretion.” Ariz. R. P. Spec. Actions 3(c). And a trial court abuses its discretion if it, among other things, “base[s] its ruling on an error of law,” as it has done here by designating the partial judgment as final. *Speer v. Donfeld*, 193 Ariz. 28, ¶ 9, 969 P.2d 193, 196 (App. 1998). But DPC does not ask us to accept special action jurisdiction, so we do not. *Harris Trust Bank of Ariz. v. Superior Court*, 188 Ariz. 159, 162, 933 P.2d 1227, 1230 (App. 1996) (this court’s acceptance of special action jurisdiction highly discretionary).

fraud in obtaining certification of the stock pond—created a material issue of fact as to the necessity of Parsons’ easement, making summary judgment inappropriate.

¶16 A denial of a motion for a new trial generally is appealable. *See* § 12-2101(F)(1) (granting appellate jurisdiction over appeal from order “granting or refusing a new trial”). Section 12-2101(F)(1) does not, however, provide appellate jurisdiction of the denial of a motion for a new trial directed at an interlocutory, partial summary judgment. *See Maria v. Najera*, 222 Ariz. 306, ¶ 13, 214 P.3d 394, 396-97 (App. 2009) (denial of new trial motion not appealable pursuant to § 12-2101(C), nor is jurisdiction created by § 12-2101(F)(1) where partial summary judgment not final pursuant to Rule 54(b)); *compare with Engineers v. Sharpe*, 117 Ariz. 413, 416, 573 P.2d 487, 490 (1977) (new trial motion directed at entry of partial summary judgment, final because it contained Rule 54(b) language, appealable pursuant to § 12-2101(C) as “order made after final judgment,” not § 12-2101(F)). As we already have stated, the partial judgment at issue here was not final under Rule 54(b). Therefore, the trial court’s denial of the motion for a new trial directed to that judgment did not provide the basis for appellate jurisdiction pursuant to A.R.S. § 12-2101(F)(1).

¶17 Finally, we lack jurisdiction to address DPC’s claim that the trial court abused its discretion when it bifurcated the easement trial from Parsons’ separate claim relating to water rights associated with its twenty-acre parcel and the stock pond. In September 2008, Parsons amended its complaint to include counts against AWD Farms, LLC, for wrongful diversion and unlawful appropriation of water, private nuisance, and

permanent injunction in regard to Parsons' water rights in the stock pond.⁴ After the court's favorable ruling that Parsons had established an easement, Parsons moved to bifurcate the trial on the width of the easement from the trial relating to its water rights. Over DPC's objection, the court granted Parsons' request. The court found that after four years of litigation the newly raised water-related issues "needlessly slow[ed] down the resolution of the original claims that were brought" and thus ordered the trials bifurcated pursuant to Rule 42(b), Ariz. R. Civ. P. The court then confirmed the trial date on the outstanding easement issues.⁵

¶18 The court's bifurcation order was interlocutory in nature because it "does not resolve a matter on the merits and may or may not be essential to the judgment." *State v. Whelan*, 208 Ariz. 168, ¶ 22, 91 P.3d 1011, 1017 (App. 2004). Such orders are not reviewable by direct appeal but only by special action. *See Ariz. Dep't of Econ. Sec. v. Kennedy*, 143 Ariz. 341, 343, 693 P.2d 996, 998 (App. 1985).

¶19 Because we lack jurisdiction to address the issues raised in DPC's appeal against Parsons, we dismiss DPC's appeal from the partial judgment in favor of Parsons and the denial of DPC's motion for a new trial in its entirety.⁶

⁴On August 5, 2009, the parties stipulated to dismiss AWD Farms, LLC, from the lawsuit with prejudice.

⁵After the entry of partial judgment on December 7, 2009, Parsons moved to dismiss its water claims without prejudice, so no trial on the water-related issues occurred.

⁶Notably, had DPC timely appealed from the entry of final judgment, it could have obtained review of the trial court's partial judgment, the subsequent denial of its motion for a new trial, and any other interlocutory orders. *See Pepsi-Cola Metro. Bottling Co. v.*

II. DPC v. the Walkers

¶20 DPC claims the trial court erred in granting the March 2009 and August 2009 summary judgments in the Walkers' favor.⁷ Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). A court should grant summary judgment "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). The party moving for summary

Romley, 118 Ariz. 565, 568, 578 P.2d 994, 997 (App. 1978) (timely appeal from final judgment "properly place[s] before [this court] the propriety of all prior non-appealable orders"); A.R.S. § 12-2102(A), (B) (upon appeal from final judgment, appellate court "shall review any intermediate orders involving the merits of the action . . . whether a motion for new trial was made or not" and may review order denying earlier motion for new trial "although no appeal is taken from the order"). Although DPC filed a Rule 60(c) motion after the final judgment, a motion currently pending in the trial court and not subject to this appeal, DPC failed to file a notice of appeal of the final judgment. Thus, although DPC may seek review from the denial of its Rule 60 motion, *see* A.R.S. § 12-2101(C) (order granting or denying Rule 60(c) motion to set aside judgment appealable as "special order made after final judgment"), it has waived appellate review of the final judgment and prior non-appealable orders, *see* Ariz. R. Civ. App. P. 9(b) (Rule 60(c) motion does not extend time for filing appeal).

⁷We have jurisdiction to review DPC's appeal directed at the December 2009 partial judgment as to the Walkers. The judgment was a final, appealable judgment because it fully disposed of the Walkers' foreclosure claims and DPC's claims of fraud and breach of contract. Ariz. R. Civ. P. 54(b); A.R.S. § 12-2101. As to the Walkers' fraud claims, we find that although the judgment left open the question of damages, it is appealable pursuant to § 12-2101(G), which allows appeal "[f]rom an interlocutory judgment which determines the rights of the parties and directs an accounting or other proceeding to determine the amount of the recovery." *See Bilke v. State*, 206 Ariz. 462, ¶ 28, 80 P.3d 269, 275 (2003); *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, ¶ 15, 211 P.3d 16, 24-25 (App. 2009).

judgment has the burden of showing there are no genuine issues of material fact and it is entitled to judgment as a matter of law. *Schwab v. Ames Constr.*, 207 Ariz. 56, ¶ 15, 83 P.3d 56, 60 (App. 2004). “On appeal from a summary judgment, we must determine *de novo* whether there are any genuine issues of material fact and whether the trial court erred in applying the law.” *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998).

A. DPC’s Negligent Misrepresentation and Fraud Claims

¶21 DPC first argues the trial court erred when it granted the March 2009 and August 2009 summary judgments in favor of the Walkers on DPC’s cross-claims for negligent misrepresentation and fraud. In granting summary judgment, the court concluded the claims were time barred, dismissing them with prejudice.⁸ We review *de novo* a trial court’s dismissal of a complaint on statute of limitations grounds. *Andrews ex rel. Woodard v. Eddie’s Place, Inc.*, 199 Ariz. 240, ¶ 1, 16 P.3d 801, 802 (App. 2000).

¶22 The limitations period for a claim of negligent misrepresentation is two years. *See Hullett v. Cousin*, 204 Ariz. 292, ¶ 23, 63 P.3d 1029, 1034 (2003); A.R.S. § 12-542(1). Thus, to be timely, DPC was required to file its amended cross-claim for negligent misrepresentation by September 2004, within two years after the cause of action accrued. And a claim for common law fraud must be filed within three years after the cause of action accrues. A.R.S. § 12-543. DPC’s fraud claim would have been timely had it been filed by September 2005, within three years after the DPC/Walker

⁸The trial court also dismissed DPC’s claim for consumer fraud, but DPC does not challenge that ruling on appeal.

transaction took place. DPC, however, did not file its cross-claim against the Walkers alleging fraud and negligent misrepresentation until February 3, 2006. The trial court did not err in dismissing the claims as time barred.⁹

¶23 DPC contends, however, that its negligent misrepresentation and fraud claims related back to the date of its original cross-claim, which was filed on December 9, 2004, and therefore were asserted timely. DPC relies on Rule 15(c), Ariz. R. Civ. P., which provides that a claim in an amended pleading relates back if it “arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading.”

¶24 But DPC’s negligent misrepresentation and fraud claims do not, within the meaning of Rule 15(c), arise from the same conduct, transaction, or occurrence as its original cross-claim. DPC’s original cross-claim against the Walkers for breach of warranty was based on the 1998 Walker/Parsons purchase agreement. DPC’s negligent misrepresentation and fraud claims, on the other hand, arose from the DPC/Walker transaction, for which escrow had closed on September 25, 2002. Thus, DPC’s claims of breach of warranty and negligent misrepresentation/fraud arose out of entirely different conduct, transactions, and occurrences. The trial court therefore did not err in granting summary judgment to the Walkers on these counts.

⁹DPC argues the two-year limitations period for the claim of negligent misrepresentation did not begin to run until May 2003, when DPC supposedly discovered the documents that gave rise to that claim. Because DPC does not support this argument with authority, and only meaningfully addressed it for the first time at oral argument, we do not address it further. See *Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996) (“Issues not clearly raised and argued in a party’s appellate brief are waived.”); see also Ariz. R. Civ. App. P. 13(a)(6).

B. DPC's Breach of Contract and Breach of Warranty Claims¹⁰

¶25 DPC next argues that its claims for breach of contract and breach of warranty against the Walkers should not have been dismissed because there was disputed evidence about DPC's knowledge of Parsons' right to run cattle over DPC's property, and that DPC presented evidence of its damages sufficient to withstand the motion for summary judgment as a matter of law. We disagree.

¶26 In its cross-claim against the Walkers, DPC alleged claims of breach of warranty and breach of contract in connection with the Walkers' failure to disclose the agreement regarding Parsons' ability to run cattle over portions of the property the Walkers had sold to DPC. In their motion for summary judgment, the Walkers argued that no breach had occurred because DPC had notice of the "cattle easement" before the close of escrow on the transaction with the Walkers in September 2002 and that DPC could not "show with admissible evidence that [it] suffered any damages" in any event.

¹⁰In granting the Walkers' motion for summary judgment, the trial court also sanctioned DPC pursuant to Rule 11, Ariz. R. Civ. P., by striking DPC's response to the motion and its contravening statement of facts in their entirety. In its ruling, however, the court found, first, that there were no "disputed facts as a matter of law [that] would require this matter to go forward." The court further stated that its order to strike DPC's response to the motion for summary judgment and to admit the Walkers' statement of facts constituted "an independent and separate basis" for granting summary judgment in favor of the Walkers. Implicit in the court's findings was that the court in fact considered DPC's arguments and evidence in deciding the motion on the merits. We therefore also consider the evidence submitted by DPC, available to the trial court at the time of the summary judgment adjudication. *See Aiken*, 179 Ariz. at 292, 877 P.2d at 1348 (on appeal from grant of summary judgment, court reviews decision on record made in superior court, considering only evidence presented to superior court when it addressed motion).

Finding no issues of material fact, the trial court granted summary judgment in favor of the Walkers. DPC argues on appeal, as it did below, that although it was aware of the existence of the easement, it did not know Parsons intended to use the easement to run cattle to the stock pond. The record does not support DPC's contentions.

¶27 First, the real estate agent involved in the DPC/Walker transaction notified DPC before the close of escrow that the easement permitted Parsons to run its cattle across DPC's property to the stock pond and that Parsons might potentially be using the easement to graze cattle. In his affidavit, the agent stated he had explained that the "small square in the middle [of DPC's property map] represented the 20-acre stock pond . . . to which [Parsons] would be running their cattle from time to time via . . . the easement." The agent's affidavit supported the Walkers' assertion that DPC had been aware of Parsons' use of the easement for cattle.¹¹ *See N. Contracting Co. v. Allis-Chalmers Corp.*, 117 Ariz. 374, 376, 573 P.2d 65, 67 (1977) (on motion for summary judgment, neither trial nor appellate court may weigh evidence).

¶28 Second, and more importantly, by its own admission DPC knew that Parsons' easement was for running cattle. At the hearing on Parsons' motion for summary judgment, in response to the trial court's inquiry as to the issue actually disputed by DPC, DPC's counsel of record at the time, Mr. Bumstead, responded that the purpose of the easement for cattle was not one of the issues in dispute:

¹¹DPC argued that it had relied on the Walkers' property listing stating cattle had not grazed on the property for over two years. But, if anything, the listing was an indication that at least at some time in the past there were cattle on the property and did not exclude the possibility of cattle grazing in the future.

THE COURT: . . . Are you conceding that there was the intention to create an easement but just being interpreted too broadly because it is resulting in free grazing over [DPC's property] and it is not disputed that there is an easement for cattle?

MR. BUMSTEAD: Correct, Your Honor. . . . We are not disputing that What we are disputing is the location of the easement.

DPC's counsel's statement constituted a judicial admission and supported the trial court's ruling on the subsequent motion for summary judgment. *See Clark Equip. Co. v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 189 Ariz. 433, 439, 943 P.2d 793, 799 (App. 1997) (judicial admission is admission of alleged fact party later cannot disprove).

¶29 Because the evidence established DPC knew about Parsons' use of the easement prior to the closing of escrow on the transaction with the Walkers,¹² the trial court did not err in granting summary judgment in the Walkers' favor on DPC's claims of breach of contract and breach of warranty.¹³

¹²And because we find there were no issues of material fact as to whether the Walkers breached the warranty and contract with DPC, we need not discuss further DPC's argument that it had presented enough evidence on damages to survive summary judgment as a matter of law.

¹³DPC claims in the heading to this argument in its brief that "the Walkers' foreclosure claim [is] not subject to summary judgment." In the following argument, however, DPC simply asserts in a conclusory manner that because the Walkers concealed Parsons' intentions with respect to the easement and their allegedly fraudulent stock pond certification, "they have no basis for foreclosure or are subject to a 100% offset." Because DPC does not develop this argument or support it with any authority, we do not address it further. *See Schabel*, 186 Ariz. at 167, 920 P.2d at 47 ("Issues not clearly raised and argued in a party's appellate brief are waived."); *see also* Ariz. R. Civ. App. P. 13(a)(6) (requiring appellant to develop argument in opening brief for each contention raised).

C. The Walkers' Claims of Fraud-in-the-Inducement and Negligent Misrepresentation

¶30 Finally, DPC argues the trial court erred in granting summary judgment in favor of the Walkers on their counterclaims for fraud-in-the-inducement and negligent misrepresentation, because there was a disputed issue as to the proximate cause of the Walkers' injury. The Walkers argued they were entitled to summary judgment because there was no dispute that Lipin and Pierron, personal guarantors on the four promissory notes DPC had executed, produced false financial assurances inducing the Walkers to rely on such assurances to their detriment. DPC contends, as it did below, that its undisputed failure to provide the Walkers accurate financial disclosures was not the cause of DPC's default on the purchase agreement. Rather, DPC maintains, its decision to withhold payment from the Walkers was in response to the Walkers' fraudulent conduct and breach of the purchase agreement.

¶31 Consistent with our previous conclusions, we find no merit to DPC's argument. The trial court properly concluded there was no genuine issue of material fact as to whether the Walkers had breached the contract or committed fraud. And DPC admitted that it willingly had withheld payment, resulting in its default on the promissory notes. Accordingly, there was no issue of material fact as to the nature of the Walkers' damages. *See CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A., P.C.*, 198 Ariz. 173, ¶ 19, 7 P.3d 979, 984 (App. 2000) (this court will uphold grant of summary judgment if

correct for any reason). We therefore find the court did not err when it granted summary judgment in favor of the Walkers on their fraud and negligent misrepresentation claims.¹⁴

III. Attorney Fees on Appeal

¶32 The Walkers have requested an award of attorney fees on appeal pursuant to A.R.S. § 12-341 and § 12-341.01. Because the Walkers have prevailed, and in the exercise of our discretion, we award them their reasonable attorney fees and costs, upon compliance with Rule 21(c), Ariz. R. Civ. App. P.

¶33 Parsons also requests an award of fees, but as a sanction against DPC for filing a frivolous appeal, pursuant to Rule 25, Ariz. R. Civ. App. P. Rule 25 allows us to “impose upon the offending attorneys or parties such reasonable penalties or damages,” “[w]here the appeal is frivolous or taken solely for the purpose of delay.” An appeal is frivolous when either (1) it is prosecuted for an improper purpose, or (2) any reasonable attorney would agree that the appeal is without merit. *Price v. Price*, 134 Ariz. 112, 114, 654 P.2d 46, 48 (App. 1982). Our determination under Rule 25, however, does not depend on the outcome of the appeal or the novelty of the issues raised. *See Ariz. Tax Research Ass’n v. Dep’t of Revenue*, 163 Ariz. 255, 258, 787 P.2d 1051, 1054 (1989). As we have stated above, the trial court erroneously certified the partial judgment as to

¹⁴DPC also argues the trial court abused its discretion when it imposed sanctions pursuant to Rule 11, Ariz. R. Civ. P., and struck DPC’s response to the Walkers’ motion for summary judgment and accompanying statement of facts because the facts it had alleged were true and the sanction, in any event, went “far beyond what was appropriate.” Because we agree with the court’s ruling on the motion for summary judgment, we need not address the merits of DPC’s Rule 11 sanction argument.

Parsons as a final, appealable judgment pursuant to Rule 54(b), thus providing a basis for DPC's appeal. Therefore, we decline to impose attorney fees as a sanction in this case.

Disposition

¶34 For the reasons set forth above, we dismiss DPC's appeal from the partial judgment in favor of Parsons and from the trial court's denial of the motion for a new trial for lack of jurisdiction and affirm the partial judgment in favor of the Walkers.

GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

PETER J. ECKERSTROM, Judge

J. WILLIAM BRAMMER, JR., Judge